

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WM. GASSELING RANCHES, INC.,

CASE NO. C09-1817MJP

Plaintiff,

ORDER

THE AMERICAN INSURANCE COMPANY.

Defendant.

The above-entitled Court has received and reviewed the following:

1. Defendant's Motion for Summary Judgment (Dkt. No. 21);
2. Plaintiff's Response, including requests to Extend the Deadline to Amend the Complaint, to Amend the Complaint, and Cross-Motion for Summary Judgment (Dkt. No. 25);
3. Plaintiff's Motion for an Order Shortening Time to Consider Plaintiff's Motion to the Deadline for Amending the Complaint and to Amend the Complaint (Dkt. No. 26);
4. Plaintiff's Motion to Strike Portions of Declaration of Jason Skuda (Dkt. No. 27);

5. Plaintiff's Motion to Strike the Declaration of Defendant's Expert, Tom Battisto (Dkt. No. 28);

6. Defendant's Reply in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motions (Dkt. No. 32);

7. Plaintiff's Motions in Limine (Dkt. No. 31);

8. Defendant's Opposition to Plaintiff's Motions in Limine (Dkt. No. 34);

9. All related declarations and exhibits; and

10. Oral Argument held March 4, 2011 (Dkt. No. 36.)

IT IS ORDERED that:

1. Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's claims are DISMISSED with prejudice.

2. Plaintiff's Motion to Extend the Deadline to Amend the Complaint is DENIED.

3. Plaintiff's Motion to Amend the Complaint is DENIED.

4. Plaintiff's Cross-Motion for Summary Judgment is DENIED.

5. Plaintiff's Motion for an Order Shortening Time is DENIED.

6. Plaintiff's Motion to Strike Portions of the Declaration of Jason Skuda for Lack of Personal Knowledge is DENIED.

7. Plaintiff's Motion to Strike the Declaration of Defendant's Expert, Tom Battisto is DENIED.

8. Plaintiff's Motions in Limine are STRICKEN as moot.

Background

Plaintiff is the owner of a hop farm in Yakima, Washington. In November 2007, a fire destroyed Plaintiff's shop building and a power company's electrical equipment. (Dkt. No. 24,

1 Griffith Decl. at 2.) Plaintiff contacted its insurance company, Fireman's Fund Insurance
 2 Company ("Fireman's Fund"), and was told the building was insured by Fireman's Fund's
 3 subsidiary, American Insurance Co. ("Defendant"). (Id.) Fireman's Fund assigned a claim
 4 number and an adjuster, John Umland to inspect the damage. (Id.) Defendant submitted
 5 payment to Plaintiff for the shop building. (Id.)

6 In February 2008, as the power company was repairing its equipment, local authorities
 7 informed Plaintiff that the power could not be reconnected until Plaintiff upgraded the wiring in
 8 the Kiln Building. (Dkt. No. 22, Exs. 8-10.) Plaintiff hired an electrician to upgrade the Kiln
 9 Building and submitted a claim to Defendant for coverage of the costs. (Dkt. No. 24, Griffith
 10 Decl. at 3.) Defendant refused because the upgrade was not covered under the insurance policy.
 11 (Dkt. No. 22, Exs. 8-10.)

12 In July 2008, Plaintiff discovered four of seven kilns in the Kiln Building were not
 13 functioning. (Dkt. No. 22, Ex. 16.) Plaintiff hired an electrician to repair the kilns and
 14 discovered the failure was due to short-circuited Mod Motors. (Dkt. No. 24, Griffith Decl. at 3.)
 15 Although the first electrician was unable to determine the cause, a second electrician believed the
 16 November 2007 fire caused a power surge, which shorted the Mod Motors. (Dkt. No. 22, Exs. 4
 17 & 5.) Plaintiff replaced the Mod Motors and submitted a claim to Fireman's Fund for damage to
 18 the Mod Motors. (Dkt. No. 24, Griffith Decl. at 3.) Fireman's Fund referred the claim under the
 19 same claim number and adjuster. (Id.) Based on the terms of the policy, Defendant determined
 20 the damage was not covered. (Id.)

21 In the complaint, Plaintiff alleged Defendant owed for damages covered under policy no.
 22 643 FRM8042833 ("the First Policy"). (Dkt. No. 1.) In its answer, Defendant filed a
 23 counterclaim, seeking a declaration that it owed no coverage "under any policy of insurance
 24

1 concerning claims associated with the [K]iln [B]uilding[.]” (Dkt. No. 10, at 4.) Defendant
 2 referred to both the First Policy and policy No. 643FRM06648193 (“the Second Policy”), as
 3 “American Polic[ies].” (Id. at 3.)

4 In its motion for summary judgment, Defendant argues American Insurance Co. did not
 5 issue the Second Policy. (Def. Mot. Br. at 1-2, n. 1.) Defendant argues the Second Policy, not
 6 the First Policy, applies to coverage related to the Kiln Building, and the Second Policy was
 7 issued by a different Fireman’s Fund subsidiary, National Surety Corporation (“NSC”). (Id.) In
 8 the documents exchanged throughout discovery, both parties refer to both policies but not the
 9 second company.

10 **Discussion**

11 **A. Defendant’s Motion for Summary Judgment**

12 Defendant moves for Summary Judgment on all of Plaintiff’s claims. Summary
 13 judgment is appropriate when it is demonstrated that there is no genuine dispute of material fact
 14 and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The
 15 moving party bears the initial responsibility of informing the Court of the basis for the motion
 16 and identifying the portions of the record that demonstrate the absence of a genuine dispute of
 17 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The party moving for
 18 summary judgment may also carry its initial burden by showing that the opposing party lacks
 19 sufficient evidence to carry its ultimate burden at trial. Id. at 323-25. If the moving party meets
 20 its initial responsibility, the burden shifts to the opposing party to establish that a genuine dispute
 21 of fact actually does exist. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87
 22 (1986). If the party opposing summary judgment fails to properly address an assertion of fact,
 23 the Court may consider the fact undisputed for purposes of the motion. Fed. R. Civ. P. 56(e).

1 In addition to attacking each claim on the merits, Defendant argues Plaintiff's losses are
2 not covered by the policy named in the complaint, i.e. the First Policy. The Court agrees.

3 1. Electrical Equipment

4 Defendant argues the damaged electrical equipment between the shop building and the
5 Kiln Building is not covered under either insurance policy because the equipment is owned by
6 the power company, not Plaintiff. (Dkt. No. 21 at 5.) Plaintiff does not dispute ownership or
7 provide any argument that the equipment is nevertheless covered. As a result, the Court grants
8 summary judgment in favor of Defendant as to any claim for damages to the electrical
9 equipment.

10 2. Cost of Upgrades

11 Defendant argues it does not owe Plaintiff for the cost of electrical upgrades because
12 coverage applies for upgrades only if caused by damage to a covered building. (Dkt. No. 21 at
13 6.) Plaintiff fails to provide any evidence showing the alleged damage to the Kiln Building
14 caused the required upgrades. The upgrades were necessary because the power company
15 replaced its equipment and the local authorities would not permit the Kiln Building to be
16 connected until it was upgraded. Since Plaintiff has not shown that these upgrades were
17 necessary because of the damage to the Kiln Building, the Court grants Defendant's motion for
18 summary judgment as to the cost of electrical upgrades.

19 3. Mod Motors

20 Defendant argues Plaintiff cannot prove the fire caused a power surge, which damaged
21 the Mod Motors. Each party offers an expert opinion as to the cause of damage to the Mod
22 Motors. Each party also asks the Court to find the opposing expert's testimony inadmissible. It
23 is unnecessary to resolve these questions.

1 Assuming without deciding that Plaintiff's expert is correct and the Mod Motors were
 2 damaged by a power surge when the electric equipment was destroyed, Defendant is still entitled
 3 to judgment as a matter of law. In this interpretation of events, the damage to the Mod Motors
 4 was still caused by damage to the power company's equipment, which was not covered by either
 5 policy. As a result, the ensuing damage to the Mod Motors is not covered, and the Court grants
 6 Defendant's motion for summary judgment.

7 4. Extra-Contractual Claims

8 Defendant requests dismissal of Plaintiff's extra-contractual claims on the basis that
 9 Defendant "paid for all covered damage[,] ... properly denied non-covered aspects of the claim
 10 ... and acted in good faith at all times." (Dkt. No. 21 at 7.) Plaintiff argues that even if
 11 Defendant was ultimately correct in determining a lack of coverage, it still breached its duty of
 12 good faith by failing to conduct a reasonable investigation.

13 Failure to investigate could constitute a breach of the covenant of good faith "regardless
 14 of whether the insurer was ultimately correct in determining coverage did not exist." Coventry
 15 Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 279 (1998). In such a situation, an insurer is
 16 liable only for expenses incurred as a result of its failure to conduct a reasonable investigation.
 17 Id. at 284.

18 Here, Plaintiff's claim fails because (1) Defendant's review of the applicable policies was
 19 reasonably sufficient to determine the losses were not covered, (2) Defendant communicated the
 20 reasons for its denial and the existence of the Second Policy in communications with Plaintiff's
 21 adjuster prior to the present suit, and (3) Plaintiff has not presented any evidence of "expenses
 22 incurred as a result of" Defendant's failure to investigate.

23
 24

1 Even if a physical investigation of the Mod Motors would have been appropriate,
 2 Defendant's failure to conduct one was not a matter of bad faith. Defendant could not examine
 3 the Mod Motors because Plaintiff had already replaced them before Defendant denied coverage.
 4 (Dkt. No. 22, Ex. 4.) As a result, the Court grants Defendant's motion for summary judgment as
 5 to the extra-contractual claims.

6 **B. Plaintiff's Motions to Extend the Deadline and for Leave to Amend its Complaint**

7 Plaintiff moves to modify the pre-trial schedule so that Plaintiff can amend its complaint
 8 to include NSC as a defendant and the Second Policy. The deadline for amended pleadings was
 9 April 2, 2010. (Dkt. No. 12.) Plaintiff has not explained its failure to include the Second Policy
 10 in its pleading before now.

11 "A schedule may be modified only for good cause and with the judge's consent."

12 Fed.R.Civ.P. 16(b)(4). "Rule 16(b)'s good cause standard primarily considers the diligence of
 13 the party seeking the amendment." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609
 14 (9th Cir. 1992).

15 Plaintiff argues good cause exists because it "mistakenly believed that American was the
 16 insuring party for the shop building and kiln building losses[.]" (Pl. Opp'n Br. at 10 (emphasis
 17 in original).) Defendant argues Plaintiff was aware of the second insurance policy if not the
 18 second insurance company.

19 In communications before and during the present litigation, Defendant denied coverage
 20 under both insurance policies and Plaintiff acknowledged the existence of the Second Policy.
 21 For example, Mr. Umland wrote to Plaintiff on December 4, 2008, stating the equipment insured
 22 by the Second Policy was not damaged by the fire. (Dkt. No. 25 at 23.) Plaintiff himself includes
 23 this excerpt in a declaration submitted in opposition to Defendant's motion for summary
 24

1 judgment. (Id.) On April 7, 2008, Plaintiff's public adjuster attached portions of the Second
 2 Policy to a letter arguing for coverage of the electrical upgrades. (Dkt. No. 33 Ex. 14.)
 3 Defendant referred to both policies by number in its request for declaratory judgment, filed with
 4 its answer, (Dkt. No. 10.), and Plaintiff referred to both policies by number multiple times in its
 5 interrogatories and requests for production filed on April 15, 2010. (Dkt. No. 33 Ex. 13.)

6 Since Plaintiff was clearly aware of both policies, Plaintiff's failure to include the Second
 7 Policy does not constitute good cause to modify the scheduling order. The Court denies
 8 Plaintiff's motion to extend the deadline to amend the complaint.

9 **C. Plaintiff's Cross-Motion for Summary Judgment**

10 In response to Defendant's motion, Plaintiff also requests summary judgment on (1) the
 11 breach of contract claim and (2) the bad faith claim. Plaintiff's motion is procedurally and
 12 substantively flawed. The deadline for dispositive motions was January 7, 2011. (Dkt. No. 20.)
 13 Plaintiff's request was filed as a response on January 31, 2011, with no request for a waiver of
 14 the dispositive motions deadline.

15 Even if it had been timely filed, Plaintiff's motion is without merit. First, Plaintiff
 16 provides no rationale justifying a finding that Defendant breached the contract as a matter of law.
 17 Second, Plaintiff's argument that "Fireman's Fund is liable for bad faith, as a matter of law" (Pl.
 18 Opp'n Br. at 19) fails because Fireman's Fund is not a party to the present lawsuit. Finally,
 19 Plaintiff fails to demonstrate the absence of a factual dispute as to whether Defendant conducted
 20 either a necessary or reasonable investigation. As a result, the Court denies Plaintiff's motion for
 21 summary judgment.

22 //

23 **D. Plaintiff's Motions to Strike**

24

1 In addition to its response to Defendant's motion, Plaintiff filed separate motions to strike
 2 portions of Defendant's attorney's declaration and Defendant's expert's declaration. (Dkt. Nos.
 3 27 & 28.) Local Court Rules direct parties to include motions to strike in responsive briefing.
 4 Local Rules, W.D.Wash. 7(g). Because the request to strike was made separately, the Court
 5 denies Plaintiff's procedurally improper motions to strike.

6 **E. Plaintiff's Motion for an Order Shortening Time**

7 Plaintiff asks the Court to shorten time for its motion to extend the deadline to amend its
 8 complaint. (Dkt. No. 26.) "Motions to shorten time have been abolished." Local Rules,
 9 W.D.Wash. 6(e). As a result, the Court denies Plaintiff's motion to shorten time.

10 **Conclusion**

11 Plaintiff has not shown that the damages in question are covered by either insurance
 12 policy. Furthermore, Plaintiff has not established that a material question of fact exists as to
 13 whether Defendant acted in bad faith. As a result, Defendant's motion for summary judgment is
 14 GRANTED and Plaintiff's claims are DISMISSED with prejudice.

15 The Court DENIES Plaintiff's motions to strike and shorten time and its cross-motion for
 16 summary judgment because they are procedurally flawed. Plaintiff had notice of the Second
 17 Policy from communications with Defendant before the present suit was filed. As a result, the
 18 Court finds no good cause exists to modify the trial schedule and DENIES Plaintiff's motions to
 19 extend the deadline and for leave to amend its complaint.

20 In light of the Court's dismissal of the case, Plaintiff's pending motions in limine are
 21 moot, and the Court orders them STRICKEN. The pre-trial conference scheduled for Monday,
 22 March 14, 2011 is therefore cancelled.

23 \\

24

1 The clerk is ordered to provide copies of this order to all counsel.

2 Dated this 11th day of March, 2011.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24



Marsha J. Pechman
United States District Judge